

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GARY W. HAYES, JASON E. NORRIS and  
GREGORY A. WATSON,

UNPUBLISHED  
June 17, 2014

Plaintiffs-Appellants,

v

ATMANDEE ENTERPRISES, LLC, d/b/a  
MANDEE’S ON BROADWAY and 3 WHEEL  
RUN, INC., d/b/a CLUB NETWORK,

No. 314276  
Wayne Circuit Court  
LC No. 12-001214-NO

Defendants-Appellees.

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Before: O’CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition in favor of defendant Atmandee Enterprises, LLC (“Atmandee”), doing business as Mande’s on Broadway, which also disposed of the claims against defendant 3 Wheel Run, Inc., doing business as Club Network (“3 Wheel Run”), in this premises liability action. We affirm.

This appeal arises from a shooting that occurred in the early morning hours of July 13, 2011, at a night club called Mande’s on Broadway, located at 1314 Broadway in the city of Detroit. 3 Wheel Run, and its individual shareholders Ronald Scott, Wilfred French, and William Tandy, leased the property at 1314 Broadway beginning in 1991 and operated a night club on the premises known as Club Network. On September 2, 2010, AWT Ventures, LLC (“AWT”), solely owned by Alvin Taylor, Sr., entered into a management agreement with 3 Wheel Run whereby AWT agreed to assume the day-to-day management and operation of the business at 1314 Broadway.<sup>1</sup> In the fall of 2010, AWT opened a night club on the premises named Mande’s on Broadway.

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<sup>1</sup> AWT and 3 Wheel Run also entered into a purchase agreement that provided that AWT would purchase the business assets of 3 Wheel Run. The parties never closed on the purchase agreement, however.

On July 12, 2011, Mande's on Broadway hosted a promotion event called "\$2 Tuesdays." Plaintiffs Gary Hayes, Jason Norris, and Gregory Watson were in attendance at the nightclub for a birthday party. Between midnight and 1:00 a.m., Hayes went to the DJ booth to request a song, and a group of four or five men standing near the DJ booth gave him "bad looks." Hayes went back to his group of friends and informed Norris of the interaction. Norris walked over to the security guard and told him there may be a problem. Hayes and Norris then went back to the DJ booth, and an argument ensued between Hayes and Norris and the group of four or five men. No threats or physical violence occurred, and Norris and a man from the other group even shook hands. When plaintiffs turned to walk away from the confrontation, one of the men involved in the argument fired gunshots that injured plaintiffs.

Plaintiffs filed a complaint against Atmandee and 3 Wheel Run alleging negligence under the theory of premises liability. After discovery had ended, plaintiffs filed a motion to amend the complaint to add parties and allegations against those parties, including Alvin Taylor, Sr., AWT, Tandy, Scott, and French. The trial court denied the motion to amend. Atmandee and 3 Wheel Run then filed motions for summary disposition under MCR 2.116(C)(8) and (C)(10). After a hearing on the motions, the trial court granted summary disposition in favor of Atmandee, and did not reach the merits of 3 Wheel Run's motion for summary disposition based on granting summary disposition in favor of Atmandee.

Plaintiffs contend that the trial court erred in granting summary disposition in favor of Atmandee. We disagree.

Although the trial court failed to identify the subrule under which it granted summary disposition, because the trial court considered documentary evidence beyond the parties' pleadings, it is apparent that the motion for summary disposition was granted under MCR 2.116(C)(10). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Therefore, any challenge by plaintiffs that summary disposition was inappropriate under MCR 2.116(C)(8) is without merit. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) by considering the affidavits, pleadings, admissions, depositions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Greene v AP Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). A motion based on MCR 2.116(C)(10) is appropriately granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty of care owed by the premises possessor depends on whether the plaintiff is an invitee, a licensee, or a trespasser. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). An "invitee" is a person who

enters upon the land upon of another for the possessor's commercial purpose or pecuniary gain. *Benton*, 270 Mich App at 440. Here, it is undisputed that plaintiffs were invitees of Atmandee. The rules that govern a merchant's duty to protect invitees from criminal acts of third parties was set forth in *MacDonald v PKT, Inc*, 464 Mich 322, 338; 628 NW2d 33 (2001), as follows:

[G]enerally merchants "have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties." The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee. Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. While a merchant is required to take reasonable measures in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties. . . . [A] merchant is not obligated to do anything more than reasonably expedite the involvement of the police. We also reaffirm that a merchant is not required to provide security guards or otherwise resort to self-help in order to deter or quell such occurrences. [Citations omitted.]

Even viewing the evidence in a light most favorable to plaintiffs, the argument between plaintiffs and the other patrons was not a specific act that posed a risk of imminent and foreseeable harm. Although a security guard at the club was informed of a potential problem between the patrons, and this security guard failed to inquire further into the potential problem, no actions were taken that rose to the level of posing a risk of imminent and foreseeable harm at that point in time. With the exception of a handshake between Norris and the other patron, at no point did any physical contact occur between the two groups of men. Moreover, no threats of violence were made and no one observed a weapon before the actual shooting. The gun shots were fired as plaintiffs were walking away from the other group of patrons, and it is undisputed that the gun shots were spontaneous and without any prior notice. Plaintiffs failed to present evidence that created a genuine issue of material fact that a duty was triggered by specific acts occurring on the premises which posed a risk of imminent and foreseeable harm to plaintiffs. Accordingly, at the time the gun shots were fired, Atmandee did not owe a duty to plaintiffs, and the trial court properly granted summary disposition in favor of Atmandee.

Plaintiffs also contend that the trial court erred in granting summary disposition because a material fact existed regarding whether Alvin Taylor, Sr. or his son, Alvin Taylor, Jr., called the police after the shooting. Although plaintiffs produced affidavit testimony that contradicted the testimony by the Taylors that they called the police after the shooting, this inconsistency did not raise a question of fact relevant to the summary disposition determination. The question here was whether a duty to call the police arose before the shooting. The events that occurred after the shooting are largely irrelevant because plaintiffs are not alleging any injuries arising from events that transpired after the shooting. Moreover, it is undisputed that the police were outside of the nightclub at the time of the shooting and responded in a timely fashion and, therefore, this argument fails.

This Court need not address 3 Wheel Run's alternative grounds for affirmance because the trial court properly granted summary disposition in favor of Atmandee, which precludes any liability on the part of 3 Wheel Run.

Plaintiffs next assert that Atmandee, through its owner and manager, the Taylors, was knowingly harboring individuals with guns and profiting from their patronage, which is an exception to the general rule that there is no duty to business invitees for the criminal acts of third parties. We disagree.

This Court, in *Wagner v Regency Inn Corp*, 186 Mich App 158, 163-64; 463 NW2d 450 (1990), recognized:

[t]he possessor of land upon which the third person conducts an activity that causes a nuisance is subject to liability if: (1) he knows or has reason to know that the activity is being conducted and that it causes or involves an unreasonable risk of causing the nuisance, and (2) he consents to the activity or fails to exercise reasonable care to prevent the nuisance.

The Court defined a nuisance in fact as a nuisance by reason of circumstances and surroundings, and stated:

[a]n act may be found to be a nuisance in fact when its natural tendency is to create danger and inflict injury on person or property. A negligent nuisance in fact is one that is created by the landowner's negligent acts, that is, a violation of some duty owed to the plaintiff which results in a nuisance. A nuisance in fact is intentional if the creator intends to bring about the conditions which are in fact found to be a nuisance. To establish intent, the plaintiff must show that when the defendant created or continued the condition causing the nuisance, he knew or must have known that the injury was substantially certain to follow, in other words, deliberate conduct. [*Id.* at 164; citations omitted.]

Although the *Wagner* Court found that the plaintiff had sufficiently raised a genuine issue of material fact regarding whether the defendants committed a nuisance in fact, the facts in *Wagner* are clearly distinguishable from the present case. In *Wagner*, the defendants were running a hotel and stolen cars, shootings, and calls to the police occurred on nearly a daily basis. *Id.* at 165. Moreover, prostitutes were maintaining rooms in the hotel on a daily basis, drug trafficking was a continual problem, and breakings and enterings, assaults, armed robberies, and car thefts occurred frequently on the defendants' premises. *Id.* The *Wagner* Court found that, as a result of these conditions that the defendants and their employees were well aware of, one could infer that the defendants derived a substantial portion of their income from the illegal activities on the premises and that they knew or should have known that the physical condition of the premises and high-degree of crime on the premises created an atmosphere of criminality. This, in turn, posed a significant risk of harm to the public safety and was substantially certain to result in the type of injury the plaintiff had suffered. *Id.* at 165-166.

In the present case, giving the benefit of reasonable doubt and inference to plaintiffs, plaintiffs did not present sufficient documentary evidence to raise a question of fact concerning whether Atmandee created and maintained a nuisance in fact on the premises. It is not reasonable to infer that the Taylors were knowingly harboring individuals with weapons in order to profit from their patronage. The shooting was an isolated incident evidenced by undisputed testimony that this was the first shooting that occurred at this nightclub. Although evidence was

presented that fights had occurred at this location on previous occasions, one may not infer that Atmandee derived a substantial portion of its income from illegal activities on the premises, and that there was a high-degree of crime on the premises, which posed a significant risk of harm to the public safety and was substantially certain to result in the type of injury suffered by plaintiffs. To the contrary, it appears that Atmandee took steps to prevent criminal activity on the premises by hiring security and attempted to deter any physical altercations or other violent crime on the premises. Given that there was no evidence of a high-degree of crime on the premises that posed a significant risk of harm to the public safety, and was substantially certain to result in the type of injury suffered by plaintiffs, a question of fact did not arise with respect to any claim that Atmandee created and maintained a nuisance in fact on the premises. Therefore, the trial court properly granted summary disposition in favor of Atmandee.

Lastly, plaintiffs contend that the trial court abused its discretion by denying their motion to amend the complaint to add parties and allegations against those parties. We disagree.

This Court reviews a trial court's decision regarding a plaintiff's motion to amend the pleadings for an abuse of discretion. *Sanders v Perfecting Church*, 303 Mich App 1, 8-9; 840 NW2d 401 (2013). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-06; 766 NW2d 903 (2009).

Except in limited circumstances, "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2). "A court should freely grant the nonprevailing party leave to amend the pleadings unless the amendment would be futile or otherwise unjustified." *Boylan v Fifty Eight LLC*, 289 Mich App 709, 728; 808 NW2d 277 (2010), citing *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). Motions to amend pleadings should be denied only for particularized reasons, which include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 401; 729 NW2d 277 (2006), quoting *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).

In this case, the record suggests that the trial court denied the motion to amend the complaint based on undue delay and futility of amendment. The trial court noted that discovery had already ended and plaintiffs had obtained the documents informing them of the other potential defendants months before the motion to amend was filed. The trial court also noted that the addition of Alvin Taylor, Sr. would be futile because plaintiffs did not set forth grounds to pierce veil of Atmandee. The trial court ultimately denied the motion to amend based on the futility of the motion because the addition of Scott, Tandy, French, AWT, and Alvin Taylor, Sr. as defendants would not alter the liability imposed under Michigan's premises liability law, and the filing of a summary disposition motion regarding whether the named defendants had a duty was forthcoming.

The trial court did not abuse its discretion by denying the motion to amend the complaint. The already named defendants and the proposed defendants had the same legal relationship to

plaintiffs, meaning they only owed a duty to protect plaintiffs from foreseeable criminal acts of third parties that occurred on the premises. Discovery had already ended, and the filing of motions for summary disposition was forthcoming. The decision to deny the motion to amend did not result in an outcome falling outside the range of principled outcomes because any addition of defendants with the same legal relationship to the parties already named in the complaint would have only caused an undue delay, and was futile if the court determined that summary disposition for the named defendants was justified. Therefore, the trial court properly denied the motion to amend the complaint.

Affirmed.

/s/ Peter D. O'Connell  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey